

Suspension With Pay Can Amount To Constructive Dismissal



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A non-unionized employee on an indefinite suspension with pay successfully claimed that he was constructively dismissed by his employer and was entitled to damages for wrongful dismissal.

The case involved David Potter, an employee of the New Brunswick Legal Aid Services Commission. When his relationship with the Commission started to deteriorate in the first half of a 7-year contract, Mr. Potter engaged in discussions with the Commission regarding a buyout of the remainder of his contract. Mr. Potter then took sick leave before the buyout negotiations were resolved and was advised during his sick leave not to return to work "until further direction". Mr. Potter's pay was continued during the suspension, but the Commission delegated Mr. Potter's powers and duties to another person and, unbeknownst to Mr. Potter at the time, the Commission wrote to the Minister of Justice recommending the revocation of Mr. Potter's appointment for cause.

Unlike an explicit termination of employment, constructive dismissal exists when the employer engages in an act or conduct that shows an intention to no longer be bound by the original employment contract. The Supreme Court acknowledged that the test for constructive dismissal has two branches.

The first branch consists of two "steps", and requires a review of the express and implied terms of the contract. The first step requires that the employee establish that the employer's unilateral change constituted a breach of either the implied or express terms of the employment contract and, if it does constitute such a breach, it must be found to **substantially** alter an **essential** term of the contract. The second step of the first branch examines whether a reasonable person in the same situation as the employee would have felt that the essential terms of the employment contract were being substantially changed at the time the breach occurred based on the information known to the employee at the time of the breach.

The second branch requires an examination of whether the employer's conduct demonstrates an intention not to be bound by the contract, giving the employee the right to treat the contract as being at an end. Under the second branch of the test for constructive dismissal, constructive dismissal can be found even where there is no breach of any term in the employment contract, or where the breach is not

substantial; it focuses on the employer's actions in relation to the contract more generally. When examining this branch, it is the totality of the employer's conduct, including conduct engaged in by the employer of which the employee was not aware at the time, that is taken into consideration in determining the employer's intent.

If either branch is established, the employee has the choice of either accepting the act or conduct engaged in by the employer, or, if the act or conduct affects the employment contract in a "fundamental" way, the employee can treat the employer's conduct as a repudiation of the contract and sue for wrongful dismissal.

Applying the test above to the facts of the case, a majority of the Court found that there were no express or implied terms of Mr. Potter's contract that permitted the Commission to suspend him indefinitely without explanation: the Commission had an obligation to provide Mr. Potter with work. The Court found that the Commission had a duty to be honest, reasonable, candid and forthright in its suspension of Mr. Potter, and concluded that the Commission had not established that the suspension was reasonable in the circumstances; rather, it was reasonable for Mr. Potter to perceive the indefinite, unexplained, unauthorized and unilateral suspension as a substantial change to his contract, and he did not acquiesce to the change. Thus the first branch of the test for constructive dismissal had been proven.

This case is a warning about the use of indefinite suspensions, even if the employee is paid during such a suspension. When contemplating a suspension, employers should be mindful that the overriding question is whether the suspension is reasonable and justified. Employers must demonstrate good faith, including being honest and forthright. If suspending an employee (even with pay), an employer should advise the employee of both the reasons for and the anticipated duration of the suspension. Employers should also review their employment contracts to determine whether suspensions are expressly permitted, and if not expressly permitted, give consideration to adding a suspension clause to future employment contracts, or carefully negotiating a suspension clause into existing contracts, to reduce the risk of constructive dismissal. Alternatively, if an employer has a policy on suspensions, this can assist in arguing that the terms of the contract were not violated.

Last Updated: March 24 2015

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